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NO. 90-767

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CABLE NEWS NETWORK, INC., and
TURNER BROADCASTING SYSTEM, INC.,
Petitioners,

v.

MANUEL ANTONIO NORIEGA and
UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE RESPONDENTS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

National Association of Criminal Defense Lawyers, Inc. (NACDL) hereby respectfully moves for leave to file the attached amicus curiae in this case. Pursuant to Rule 37.2 of the Rules of this Court, amicus has been unable to obtain the written consent to the submission of this brief of all parties to this action due to the severe time constraints imposed for filings herein. Amicus has however, obtained consent of respondents.

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia non-profit cor-

poration with a membership of more than 5,000 lawyers and 25,000 affiliate members, including representatives of every state. NACDL was founded over twenty-five years ago to promote study and research in the field of criminal defense practice and to encourage the integrity, independence and expertise of defense lawyers.

Among NACDL's stated objectives is the promotion of the proper administration of criminal justice. Consequently, NACDL concerns itself with the protection of individual rights and the improvement of the criminal law, its practices and procedures. A cornerstone of this organization's objective, and of the criminal justice system, is the fundamental constitutional protection of an individual's fourth amendment rights. NACDL is very concerned about any decision that would undermine or dilute this constitutional guarantee, as would adoption of the position taken by the petitioners in the instant case.

The Amicus Curiae Committee for the NACDL has discussed this case and decided that the issues are of such importance to defense lawyers throughout the nation that NACDL should offer its assistance to the court.

Respectfully submitted,

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The brief is submitted on behalf of The National Association of Criminal Defense Lawyers.

INTERESTS OF AMICUS CURIAE

Pursuant to Rule 37.2 of the Rules of this Court, amicus has been unable to obtain the written consent to the submission of this brief of all parties to this action due to the severe time constraints for filings herein. Amicus has however, obtained the oral consent of respondents.

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia non-profit corporation with a membership of more than 5,000 lawyers and 25,000 affiliate members, including representatives from every state. NACDL was founded over twenty-five years ago to promote study and research in the field of criminal defense practice and to encourage the integrity, independence and expertise of defense lawyers. Amicus has a particular interest in preserving the confidentiality of attorney-client communications.

AN UNNECESSARY CONFLICT

Attorneys who represent individuals accused of crime are by their very nature sensitive to conflicts between competing interests within the Bill of Rights. This case presents a classic confrontation between a District Court's restraining order imposed to protect the vital constitutional rights of an accused, and the explicit constitutional command that the freedom to publish not be abridged.

But this is a conflict which never should have arisen. It would appear that here it is the Government, not the press, that is the real culprit for having invaded these privileged communications in the first place. Nevertheless, it is the publication of these confidential communications which poses the greatest threat to the rights of the accused.

SUMMARY OF ARGUMENT

AMICUS OPPOSES ANY STAY

Amicus urges this Court to deny Petitioner's Application to Stay the District Court's restraining order. For to permit publication of these confidences is to destroy them. To permit publication of these presumptively privileged communications without first affording the District Court an opportunity to review same, is to deprive that Court of any meaningful opportunity to weigh the competing interests between the accused, the press, and the public. And to grant a stay now, before this matter is heard, will permit dissemination to over 400 million viewers worldwide, effectively pretermitting any such determination by this Court as well.

ARGUMENT AND AUTHORITIES

OLDEST PRIVILEGE KNOWN TO LAW

The attorney-client privilege, which can trace its roots back to ancient Rome,[1] has been described by this Court as "the oldest of the privileges for confidential communications known to the common law", *Upjohn Co. v. United States,* 449 U.S. 83, 66 L.Ed.2d 584, 591, 101 S.Ct. 677 (1980).

> "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. . . . Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice. The privilege recognizes that sound legal

1. See: Radin, *The Privilege of Confidential Communications Between Lawyer and Client,* 16 Cal. L. Rev. 487 (1928).

> advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client."

The attorney-client privilege, the Sixth Amendment right to "effective assistance" of counsel, and the Fifth Amendment right to a fair trial are all inextricably intertwined. Without the ability to communicate and seek advice of one's counsel in confidence there can be no effective assistance.

Where a presumptively innocent accused is detained without bail, his inability to seek and obtain legal advice in confidence affects the fairness of those proceedings. Depending upon the substance of Noriega's discussions with his counsel, the publication and disclosure of the contents of those tape recordings may prevent any prosecution at all.

DISTRICT COURT DEPRIVED OF OPPORTUNITY FOR MEANINGFUL REVIEW

Yet here the Petitioners seek to publish tape recordings of acknowledged attorney-client communications without affording the District Court an opportunity to determine their privileged nature, or the impact such publication would have upon the individual's rights.

> "Thus, the court was in effect being asked to make a factual determination without being allowed to review the facts. On this point, it is important to note that CNN is in possession of the tapes, and has resisted turning them over to the court for review. It seems fundamentally unfair to allow CNN to benefit from its refusal to disclose the contents of the tapes to the court—that is, to allow CNN to argue that no prior restraint should issue because no clear and immediate harm is apparent when the only reason that

no clear and immediate harm yet appears is because CNN has so far prevented this court from reviewing the content of the tapes in its possession." Supplemental Order entered in *U.S. v. Noriega,* No. 88-0079-CR-Hoeveler on November 9, 1990.

As the Eleventh Circuit noted:

"CNN has shackled the District Court by refusing that court's reasonable request to review the audio tapes it has in its possession and which CNN desires to broadcast. While appealing to our nation's judicial system for relief, CNN is at the same time defiant of that system's reasonable directions. . . .

The District Court must possess the subject tapes in order to make its *in camera* determination of whether the attorney-client communications are privileged. We are troubled by CNN's refusal to obey the District Court's order to release the tapes in question to the court." *In re Cable News Network and Turner Broadcasting System, Inc.,* ____F.2d____, No. 90-0832 (11th Cir. November 10, 1990).

STAY WOULD EFFECTIVELY PRECLUDE REVIEW BY THIS COURT AS WELL

Now Petitioners seek a stay from this Court permitting dissemination of these presumptively privileged communications[2] to over 400 million viewers worldwide, pretermitting any meaningful review or consideration of the rights of the accused.

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2. The trial court specifically found that the attorney client privilege had been violated:

"Defendant characterizes the issue as a violation of the attorney-client privilege. To be sure, there is no question that such a violation had occurred. CNN concedes that the tapes contain communication between Noriega and his lawyers or staff, and there is no indication that the attorney-client privilege was waived" *See* Order entered by Judge Hoeveler, November 8, 1990 Petitioner's Appendix p. 22a.

STANDARD OF REVIEW

The decision as to whether to grant injunctive relief rests within the sound discretion of the trial court. *Nixon v. Warner Communications,* 435 U.S. 589, 55 L.Ed.2d 570, 98 S.Ct. 1306 (1978); *Belo Broadcasting Corp. v. Clark,* 654 F.2d 432 (5th Cir. 1981). *See also U.S. v. Columbia Broadcasting System, Inc.,* 497 F.2d 102 (5th Cir. 1974) [trial court has broad discretion to regulate matters affecting the trial process]; *U.S. v. Schiavo,* 504 F.2d 1 (3rd Cir. 1974). Furthermore, this Court has recognized the trial court's "affirmative constitutional duty" to ensure a fair trial by "minimiz[ing] the effects of pre-trial prejudicial publicity". *Gannett Co. v. DePasquale,* 443 U.S. 368, 378, 99 S.Ct. 2898, 2904, 61 L.Ed.2d 608 (1979). Absent an abuse of that discretion, the District Court's decision should not be disturbed.

> "In urging reversal of the district court's determination that Moore's rights would be compromised by access to the tapes, the appellants would have us say that the trial court must have positive proof of the impossibility of assuring defendant a fair trial before access may be denied. A forecast of future difficulty is by definition uncertain, but equally uncertain is the rejection of that forecast. *Speculative dismissal by an appellate court of a trial judge's admittedly uncertain but quite reasonable prognostication only compounds the problem. The informed and considered judgment of the trial judge should prevail in any choice between such equally speculative results. It is better to err, if err we must, on the side of generosity in the protection of a defendant's right to a fair trial before an impartial jury.*" (emphasis supplied) *Belo Broadcasting Corp. v. Clark,* 654 F.2d 423, 431 (1981).

By depriving the District Court access to the tapes below the Petitioners effectively precluded any meaningful determination of these competing interests.

By seeking permission to publish those tapes before this case is heard, Petitioners wish to deprive this Court of that opportunity as well.

As the Second Circuit points out in *Application of Dow Jones & Co., Inc.*, 842 F.2d 603, 609 (2nd Cir.), *cert. denied*, 488 U.S. 946, 102 L.Ed.2d 365, 109 S.Ct. 377 (1988):

> "When the exercise of free press rights actually tramples upon Sixth Amendment rights, the former must nonetheless yield to the latter."

If contractual rights and "the appearance of confidentiality so essential to the effective operation of our foreign intelligence services" may take precedence over the right to publish See: *Snepp v. United States*, 444 U.S. 507, 62 L.Ed.2d 704, 100 S.Ct. 763 (1980), then surely maintaining the confidences so essential to obtaining the assistance of counsel would as well.

If one's "ability to earn a living as an entertainer" has been held to have prominence over a television station's First Amendment right to broadcast, See: *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 53 L.Ed. 965, 97 S.Ct. 2849 (1977), then surely the threat to an accused's liberty should carry equal weight.

If "[t]he first amendment is not a license to trample on legally recognized rights in intellectual property", See: *Dallas Cowboys Cheerleaders v. Scoreboard Posters, Inc.*,

600 F.2d 1184, 1188 (5th Cir. 1979), then surely it is not a ticket to "trample on legally recognized rights" of the criminally accused, where more than one's "intellect" is at stake.

> "In our nation, the courts are charged with safeguarding a defendant's right to a fair trial and with cautiously balancing First Amendment and Sixth Amendment interests. 'It is not asking too much to suggest that those who exercise First Amendment rights in newspapers or broadcasting enterprises direct some effort to protect the rights of an accused to a fair trial . . .' " *In re Cable News Network, Inc. and Turner Broadcasting System, Inc.*, ____F.2d____, No. 90-9832 (11th Cir. November 10, 1990), *citing, Nebraska Press Ass'n*, 427 U.S. 539, 560, 49 L.Ed. 2d 683, 96 S.Ct. 2791 (1976).

At the very least, First Amendment concerns could await proper review by this Court.

CONCLUSION

Petitioner's Application for Stay should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gerald H. Goldstein, a member of the Bar of this Court, hereby certify that on this 17th day of November,

1990, one copy of the Brief Amicus Curiae of the National Association of Criminal Defense Lawyers in the above entitled case was served by mail and by fax upon Frank A. Rubino, Esq., 2601 S. Bayshore Dr., Suite 1400, Coconut Grove, Fla. 33133, Counsel for the respondent Noriega herein, and upon Terry S. Beinstock, Esq., and Dan Waggoner, Esq., (by fax only) Suite 3160, S.E. Financial Center, 200 So. Biscayne Blvd., Miami, FL 33131, counsel for the petitioners Cable News Network and Turner Broadcasting, Inc. herein, and upon Dean I. Ringel, Esq., 80 Pine Street, New York, NY 10005, and upon Dexter W. Lehtinene, Esq., United States Attorney, 155 S. Miami Ave., Miami, Fla. 33130, counsel for the respondent United States of America herein, and upon the Solicitor General, Department of Justice, Washington, D.C. 20530. I further certify that all parties required to be served have been served.

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